



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

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**DECISION OF THE BOARD**

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Mailed and Filed: JANUARY 18, 2023

IN THE MATTER OF:

Appeal Board No. 625962

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective April 1, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by STERLING FLOOR DESIGNS LTD prior to April 1, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed September 15, 2022 (), the Administrative Law Judge granted the employer's application to reopen A.L.J Case No. 022-17817, and overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board, insofar as it overruled the initial determination disqualifying the claimant from receiving benefits, effective April 1, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to April 1, 2022 cannot be used toward the establishment of a claim for benefits.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant was employed full time as the accounts payable clerk by the employer flooring contractor for more than 13 1/2 years. On March 23, 2022, the claimant was presented with a "Written Job Performance

Warning" which addressed what the employer referred to as the claimant's "negative tone" towards coworkers; statements to coworkers that the company was disorganized; statements to coworkers regarding not having gotten a raise; and a decline in the claimant's job performance, specifying that she had failed to order safety goggles as requested. The warning concluded that failure to correct these issues may result in disciplinary action up to and including termination.

On Monday, March 28, 2022, the newly-hired office manager (DC), who had been with the employer for about two weeks, asked the claimant to show her what she did. The employer's vice president (JH) wanted the new office manager to understand everyone's role and job function in the office, particularly the process of the claimant's work, as it involved checking and double-checking figures. In response, on that Monday, Tuesday, Wednesday and Thursday, the claimant called DC over to her desk each time she was performing a new task. On one occasion, in the presence of JH, the claimant demonstrated to DC how to pay the employer's bills online.

Shortly before 5:00 P.M. on Thursday March 31, 2022, DC came over to the claimant's desk to observe what she was doing. The claimant had been working all day to reconcile one of the employer's credit card statements so that it could get paid, and wanted to complete the task before the end of the day. The claimant told DC what she was doing, that she wanted to get it done, and that she would show DC the process once the task was completed. The claimant did not shield her computer screens so that DC was unable to see her work, and did not refuse to show her work to DC.

About 30 minutes later, when the claimant had completed the task but before she could show DC what she had done, the claimant was called into an office where the employer's president (IH), vice president (JH), and director of operations were present. JH told the claimant that she was discharged, effective immediately.

**OPINION:** The record establishes that the claimant was discharged on March 31, 2022 because the employer concluded that the claimant had been insubordinate that day when she refused to show her work to the new office manager upon being instructed to do so, and shielded her computer screen with her body so that the office manager could not observe her work. We find, however, that credible evidence fails to establish that the claimant engaged in the conduct for which she was fired.

We are not convinced that the final incident happened the way the employer's witnesses testified, and find the claimant's account of the event more credible than the internally inconsistent testimony provided by the employer's three witnesses. Specifically, the claimant's consistent and credible testimony establishes that she did not refuse directives to show her work to the new office manager on March 31, 2022, and did not purposely shield her computer screens with her body to prevent the office manager from seeing what she was doing.

The claimant has consistently testified about her conduct on March 31, 2022, and on the days leading up to her last day of employment. She credibly testified that she shared what she was doing with DC during that week, specifically recounting that she showed DC how she paid the employer's bills online when JH was present. This testimony was not disputed by the employer; in fact, the employer's director of operations testified that he witnessed the claimant trying to train DC on March 31, 2022. In addition, the claimant credibly testified that the final incident occurred when she was trying to finish reconciling a credit card statement so it could be paid, a task she had been working on for hours, and that she wanted to complete before the end of the day. This testimony is also not disputed, and is in fact supported by the testimony of the employer's vice president, JH, who stated that he heard the claimant say to DC, "I'm busy, I'll show you later."

We are not persuaded by the testimony of the employer's president that the claimant was repeatedly told by both DC and JH on the afternoon of March 31, 2022 to move away from her computer and show DC

her work, and that the claimant refused to do so, and threw her body in front of the computer screen. Not only was the president not a witness to the incident, but her testimony is contradicted by the firsthand testimony of JH, who testified that he did not interject at all during the interaction between the claimant and DC that day, and stated only that the claimant was seated at her desk in such a way that it was difficult for someone sitting behind her to see what she was doing.

Additional inconsistencies in the version of events testified to by the employer's witnesses further discredit the employer's account. For instance, the president testified that the claimant was being asked to show her work to the new office manager as part of "coaching" and "rehabilitation" in relation

to her warning a week earlier. However, as made clear by the claimant and the employer's vice president, the reason the claimant was being asked to show the new office manager her work, was so that the office manager could get familiar with the jobs everyone was doing. Since it had nothing to do with the claimant's warning, the employer's attempt to connect the claimant's alleged conduct on March 31 with her warning a week earlier, and establish that the claimant was being obstreperous about improving her performance, is unsuccessful. We are also not convinced by the president's testimony that the employer saw "so many problems" and "lots of errors" with the claimant's work. Aside from the fact that poor performance does not constitute misconduct under the Labor Law, the president's testimony is inconsistent with the warning given to the claimant a week before she was discharged. That warning lists a single instance of dissatisfaction with the claimant's work performance, which in addition was wholly unrelated to the alleged conduct for which the claimant was fired.

We find that credible evidence does not establish that the claimant either failed or refused to share her work product with the new office manager, or that she intentionally blocked her computer screens so they could not be seen, and thus fails to establish that the claimant was insubordinate. At most, the evidence establishes that when the claimant was approached by DC late in the day on March 31, 2022, she was busy working on something that she wanted to complete before the end of the day, and told DC that she would show her the work later, after the task had been completed. The claimant's request to share her work later was not a refusal, and was reasonable. Further, the record lacks any credible evidence establishing that the claimant purposely blocked her computer screens from view. Therefore, the credible evidence fails to establish that the claimant's conduct on March 31, 2022 amounted to misconduct for unemployment insurance purposes. Accordingly, we conclude that the claimant was separated from employment under nondisqualifying circumstances.

**DECISION:** The decision of the Administrative Law Judge, insofar as appealed from, is affirmed.

The initial determination, disqualifying the claimant from receiving benefits, effective April 1, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to April 1, 2022 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER